Nos. 94-1620 and 94-1621

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AND THE UNITED NEGRO COLLEGE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

(Additional Counsel Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

May 1, 1995

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit organization established in 1963 at the request of the President of the

United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. The Lawyers' Committee has a long history of participation in school desegregation cases, see, *e.g.*, *Missouri* v. *Jenkins*, No. 93-1823; *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), and in cases addressing the principles of affirmative action, including *Adarand Constructors, Inc.* v. *Peña*, No. 93-1841; *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 467 (1989), and is concerned with the development of sound precedent regarding the means of eliminating the effects of discrimination.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Maryland is its statewide affiliate. The ACLU has been deeply involved in the effort to desegregate America's schools and to remove the vestiges of prior *de jure* segregation. As part of that ongoing effort, the ACLU served as counsel in *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992). The ACLU has also participated in most of this Court's cases concerning discrimination.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization with more than 500,000 members. Equal educational opportunity for minority group citizens, particularly African-American youth, has been one of the fundamental goals of the NAACP since its founding. As epitomized by its role in the landmark *Brown* decision, the NAACP historically has been a leader in litigating school desegregation cases at the elementary, secondary and college level, and related constitutional and civil rights issues in public education. Currently, the NAACP is a party in

numerous cases across the country which address issues of equality of opportunity and quality education in public school systems.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national nonprofit civil rights organization dedicated to promoting the rights of Hispanics in the United States in the areas of education, employment, immigration and political access. One of MALDEF's Education Program goals is to dismantle—through litigation and public policy advocacy—institutional discrimination that impedes Hispanic students' attainment of post-secondary educational degrees. MALDEF is particularly concerned about any cutback in or decreased commitment to affirmative action programs aimed at increasing the number of Hispanic students admitted to, retained in and graduated from post-secondary educational institutions. MALDEF has represented Hispanic students, immigrant students, and their parents in desegregation cases.

The Puerto Rican Legal Defense & Education Fund, Inc. ("PRLDEF") is a national civil rights organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF has been involved in many education cases involving the rights of Latinos to bilingual education, desegregated education and quality education. PRLDEF is concerned with recent efforts to reduce affirmative action in higher education. Currently, Latinos are 12% of the 18- to 24-year olds but less than 4% of the students attending four-year colleges. PRLDEF is interested in this case because it concerns the use of affirmative action in scholarships for minorities. It believes there should be more effort to provide these benefits to Latinos. However, it does not believe that the Banneker Program's targeting of African-Americans violates the rights of Latinos or others.

The United Negro College Fund ("UNCF") represents forty-one private, historically black colleges and univer-

sities located in Ohio and throughout the south and southwestern United States. UNCF institutions enroll fifty-five thousand predominantly African-American students, as well as international students and many white Americans. UNCF member institutions have always been, and continue to be, advocates for and practitioners of equal opportunity in higher education—employing faculty, staff and administrators from all racial, religious and ethnic backgrounds. While serving a primarily African-American student constituency, UNCF embraces and advocates on behalf of the interest of all minority students in higher education. Like historically black colleges and universities, minority and race-specific scholarships remain an essential tool for educating and training minority students for employment and productive citizenship in the twenty-first century.

INTRODUCTION

This case is of extraordinary national importance because it involves two fundamental civil rights issues that the Court has confronted in recent years: 1) the obligation of States with formerly segregated higher education systems to dismantle those systems; and 2) the circumstances in which States can implement affirmative action programs. The court below was asked to assess the propriety of a race-based scholarship program adopted by a State university as one element of a plan to dismantle a *de jure* segregated higher education system in response to uncontested findings of the United States Department of Education and the State of a continuing constitutional violation. The essential question presented in this case is whether the panel erred in applying the standard for reviewing voluntary, race-conscious affirmative action programs undertaken in the absence of a history of *de jure* segregation, set forth in *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), rather than the standards establishing the constitutional obligation effectively

to eliminate all vestiges of dual educational systems set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992), and this Court's school desegregation precedent.

The Fourth Circuit's decision conflicts with and ignores the legal standard applicable to a state university that adopts a race-based remedy to fulfill its constitutional duty to eliminate the vestiges of a prior *de jure* segregated system. In evaluating the Banneker scholarship program adopted by the University of Maryland at College Park ("the University" or "UMCP"), the panel erroneously relied upon this Court's decisions concerning the adoption of purely voluntary race-based policies in cases which did not involve any proven violations of law or any established history of official segregation and discrimination—*Croson*, 488 U.S. 469, and *Wygant*, 476 U.S. 267—and ignored this Court's decisions confirming that States have an affirmative obligation to remove all vestiges of *de jure* segregated school systems. Thus, the law of the Fourth Circuit is that *Croson* and *Wygant* have supplanted the large body of school desegregation jurisprudence from *Brown* to *Fordice*.

The question whether the Fourth Circuit correctly construed the Court's decisions is one of fundamental importance because the panel's holding directly will affect the rights of students, faculty and the public to have higher education systems dismantle dual systems and eliminate the effects of discrimination. Former *de jure* segregated systems have necessarily employed race-conscious remedies to dismantle dual systems of education. Likewise, voluntary action by school authorities is not only required, but is encouraged to avoid unnecessary judicial administration of educational systems. The decision below threatens the availability of relief necessary to dismantle dual systems and affirmatively discourages voluntary remedial action by school authorities to fulfill their obligation to dismantle *de jure* segregated systems. As a result, States in the Fourth Circuit will be reluctant to

take initiatives to eradicate the lingering effects of unlawful public education systems and students may be forced to seek relief in the federal courts. To avoid such a result, this Court should grant the petitions and provide the States and the lower courts with urgently needed guidance on the proper legal standard under which state remedial programs are to be reviewed by the courts.

To assist the Court in evaluating the parties' petitions, this brief will focus on two points. In Section I, the brief explains that the panel used the wrong legal standard in evaluating UMCP's Banneker scholarship program. Specifically, the panel erred in using the standard adopted in *Croson* and *Wygant* for purely voluntary affirmative action programs undertaken in the absence of any established record of *de jure* segregation, and failed to apply the long-standing standards imposed on prior *de jure* school systems that have not attained unitary status, namely that the school system is constitutionally compelled to take remedial action. A proper analysis would adhere to the standards and principles established by this Court's school desegregation cases.

In Section II, the brief discusses how the panel's application of the wrong legal standard, and its failure to consider the historical context, caused it to reach conclusions that are wholly at odds with the uncontested facts regarding Maryland's dual higher education system and irreconcilable with the holdings of the Court's key desegregation decisions. First, the panel's conclusion that the State did not have a "compelling interest" in taking remedial action conflicts with the acknowledged dual system and the undisputed findings of the State and the district court that the system has not been fully dismantled, and that the effects of the dual system persist. The panel simply ignored both fact and law in concluding that two of the State's proffered justifications for the remedial scholarship program—poor reputation and hostile campus climate for African-Americans—are irrelevant as a matter

of law. These effects consistently have been recognized in this Court's desegregation cases as vestiges of segregated systems that must affirmatively be remedied. Second, the panel's analysis under the "narrow tailoring" standard was equally erroneous. The appropriate standard must take into account the State's obligation to implement an effective remedial program that dismantles the dual system and eliminates the vestiges of discrimination. *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); *Fordice*, 112 S. Ct. at 2735; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979) ("*Dayton II*"); *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437 (1968).[1]

REASONS FOR GRANTING THE PETITIONS

I. THE FOURTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

One of the most striking things about the Fourth Circuit's opinion is that it makes virtually no reference to any of this Court's decisions establishing and confirming the States' long-standing obligation to take all action necessary to eliminate segregation and discrimination in public education. The Fourth Circuit reasoned that the fact that the defendant was a public university that had engaged for more than a century in notorious and egregious acts of discrimination was not relevant. From the panel's opinion, one would never know of the existence of the obligations imposed by *Brown* v. *Board of Education* and reaffirmed many times thereafter, most recently in *Fordice*, much less Maryland's shameful history of *de jure* segregation in all levels of education.

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[1] *Amici* note that the second Question Presented in the separate Petition of William E. Kirwan, *et al.*—whether a State's interest in promoting diversity can be a constitutionally sufficient justification for remedial action—though raised, was not addressed by either court below. Therefore, to the extent that this Court does not reverse on the basis of the remedial justification, the appropriate disposition of this case is to vacate and remand for consideration of the State's alternate diversity rationale.

This fundamental shortcoming is traceable to the panel's erroneous conclusion that this Court's decisions in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), provide the correct legal standard for resolution of this case. *Croson* and *Wygant* both involved public entities that adopted affirmative action policies in areas where there was no established record or history of prior discrimination. In neither case were there any findings, either judicial or administrative, that the existing racial disparities in particular areas were traceable to past acts of discrimination by the public entities, let alone a prior system of state imposed *de jure* segregation. *Wygant*, 476 U.S. at 278 ("no such determination [of prior discrimination in hiring by school board] ever has been made"); *Croson*, 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry") (citations omitted). Using as its starting point precedent relevant to these different factual contexts, the Court concluded that the voluntary affirmative action programs could not withstand strict scrutiny because the public entities had neither demonstrated a compelling interest in implementing race-conscious remedial actions nor adopted remedies that were narrowly tailored to address prior discrimination.

Because *Croson* and *Wygant* presuppose no record of past *de jure* discrimination and no constitutional duty to dismantle an unlawful system, the panel erred in mechanically applying those decisions to a case where the state actor has a long history of discrimination and there are undisputed findings that the violation has not been cured. The panel failed to apply the long-standing and unequivocal obligations imposed on *de jure* public education systems by *Brown* and its progeny. That is, the panel ignored the existence of the historical system of segregated education and the State's affirmative duty to rem-

edy the constitutional violation, and instead analyzed the Banneker scholarships as a wholly voluntary program isolated from any past discrimination, like the programs in *Croson* and *Wygant*.

The panel's analysis is deficient and will lead to confusion because it displaces the standards and principles established by this Court's school desegregation decisions. These principles and standards control the legal analysis of race-conscious remedial programs undertaken by prior *de jure* school systems. First and foremost, the legal analysis must recognize that States that maintained *de jure* school segregation are under a continuing, affirmative duty to eradicate the *de jure* system and its lingering effects. "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present." *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); see also *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (school district has an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"); *Dayton II*, 443 U.S. 526, 538 (1979). This obligation applies to higher education systems as well as to primary and secondary systems. *Fordice*, 112 S. Ct. at 2735 (1992) ("Nor is there any dispute that [the affirmative obligation fully to dismantle dual systems] applies to [Mississippi's] higher education system").

Second, contrary to the panel's standard that presumed the illegality of the State's remedies, when a State has maintained a *de jure* school system, it is presumed that current racial imbalances are causally related to the prior segregation, and the party contesting the causal relationship bears the heavy burden of proving otherwise. See *id.* at 2741 ("*Brown* and its progeny . . . established that

the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system"); *Dayton II*, 443 U.S. at 537 (1979); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459-61 (1979); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 210 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); see also *Freeman*, 112 S. Ct. at 1447 ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation").

Third, race-conscious remedies typically are required to remedy racially discriminatory policies and conduct by the State. *Fordice*, 112 S. Ct. at 2736 ("We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system"); *Swann*, 402 U.S. at 25 ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations"); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy"). Thus, race-based policies must be evaluated in light of the state actor's affirmative duty to eliminate the effects of *de jure* discrimination and its record of pursuing other remedies. Given the State's *affirmative obligation* to take remedial action, courts must grant states latitude "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 15-16.

Pursuant to the desegregation precedent applicable to this case, the correct analysis is not that applied in *Croson* and *Wygant*, which did not involve any proven violations of law or an established history of official segregation and discrimination. Under this Court's de-

segregation cases, the onus is on former *de jure* school systems to identify and eradicate all vestiges of their prior systems, as well as to eliminate policies that could perpetuate the dual system or impede the attainment of unitary status. *Fordice*, 112 S. Ct. at 2735; *Dayton II*, 443 U.S. at 538. The ultimate measure of the State's compliance with its constitutional obligations "is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Id.* Accordingly, race-conscious remedies must be implemented if they are necessary "to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16.

The foregoing principles must be taken into account by courts that are evaluating the purpose and effectiveness of remedies adopted by school systems to eliminate vestiges of segregation. School authorities attempting to meet their constitutional obligation should be accorded deference in crafting remedies, particularly when previous remedies have proven unsuccessful. The dismantling of dual systems is a complex process that may involve some trial and error, but such systems are constitutionally mandated to keep searching for effective remedies until they have achieved unitary status, and must be given the flexibility to do so.

In sum, the panel's error was in ignoring the historical context in which UMCP adopted its race-conscious policies and the pronouncements of this Court with respect to prior *de jure* school systems. Those pronouncements make clear that such school systems are under affirmative obligations to take remedial action that distinguish them from state actors that adopt affirmative action policies on a purely voluntary basis outside the context of prior systemic segregation. The panel's failure to recognize this distinction leaves both courts and state actors without proper guidance as to the legal standards in this area.

II. THE PANEL'S APPLICATION OF THE WRONG LEGAL STANDARD, AND ITS FAILURE TO CONSIDER THE HISTORICAL CONTEXT WHEN EVALUATING THE FACTS, CAUSED ITS ANALYSIS TO BE WHOLLY INCONSISTENT WITH THIS COURT'S SCHOOL DESEGREGATION CASES.

The Fourth Circuit's opinion powerfully illustrates the anomalous and erroneous conclusions that can result from a mechanical application of *Croson* and *Wygant*, as opposed to the principles that undergird the school desegregation cases. If the opinion is allowed to stand, lower courts and state actors, particularly former *de jure* school systems, will face conflicting guidance as to the legal standards that govern judicial review of efforts to dismantle segregated school systems.

A. The Panel's Application Of The "Compelling Interest" Analysis Was Erroneous.

Although the panel ultimately held that there were material factual disputes on the "compelling interest" issue that could not be resolved without a trial, *Podberesky* v. *Kirwan*, 38 F.3d 147, 157 (4th Cir. 1994) (J.A. 18a), the panel's analysis contains fundamental legal errors that are the direct result of its failure to apply the correct legal standard and to consider the historical events that led to UMCP's adoption of the Banneker scholarship program. Indeed, the compelling interest standard effectively is inapposite to dual systems with an affirmative constitutional duty to desegregate. See *United States* v. *Paradise*, 480 U.S. 149, 167 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"). The affirmative duty to dismantle its unlawful system dictates that the State employ race-conscious remedies as necessary to disestablish dual systems and their effects.

The panel's analysis is devoid of any recognition of either the legacy of the dual system in Maryland or the

State's efforts to address the administrative findings of a continuing constitutional violation. In light of the history of segregated education in Maryland and the uncontested administrative findings, the existence of an affirmative duty to act in this case is clear. Only by viewing the State's proffered justifications in isolation from history and the applicable standards under the desegregation cases could the panel have concluded otherwise. Thus, the panel's opinion is irreconcilable with the Court's school desegregation decisions.

The panel's analysis contains three serious errors. *First*, when a State has maintained a *de jure* segregated school system, it is presumed that current racial imbalances or inequities are causally related to the prior segregation. See *supra* at 9-10. In this case, the State does not contest this presumption in relation to the four factors. Yet, to the extent that it viewed the University as carrying a burden to demonstrate that the present effects were causally related to its prior conduct, the panel's analysis directly conflicts with this standard.

Second, the panel's conclusion that UMCP's poor reputation in the African-American community and racial hostility on campus are irrelevant *as a matter of law* flies in the face of this Court's school desegregation decisions, which have recognized that "[i]n a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors." *Fordice*, 112 S. Ct. at 2736. Indeed, the panel's decision trivializes the impact upon real people, particularly young students, of the legacy of a dual system that this Court has held must be remedied. The record in this case establishes real and justified negative perceptions of the University by African-Americans as a result of over a century of *de jure* segregation and decades of resistance by the State to its constitutional duty to eradicate the dual education system.

With respect to UMCP's poor reputation in the African-American community, the panel dismissed this justification out of hand, concluding that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (J.A. 10a). Yet this Court and others consistently have recognized that poor community reputation is a significant vestige of discrimination and a direct result of state resistance to eliminating the legacy of segregation that must be remedied in the course of attaining a unitary system. See *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1446 (1992) (in determining whether a school system has been desegregated, courts must examine "whether the school district has demonstrated, to the public and to the parents and the students of the once disfavored race, its good faith commitment" to nondiscrimination); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973) (in determining whether a school is segregated, a court should examine "the community and administration attitudes toward the school"); *United States* v. *Board of Sch. Comm'rs*, 506 F. Supp. 657, 673 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (ordering school-community relations program as part of desegregation plan); see also *Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) ("The reputation of the [Mississippi Highway] Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices"; ordering additional recruitment measures "to insure that black applicants will be attracted to the force"). In short, the panel's conclusion that poor reputation is irrelevant *as a matter of law* simply cannot be squared with this Court's precedent and reveals a striking disregard of the real-world effects of *de jure* segregation and the difficulty of eradicating them.

The panel's conclusion with respect to the State's findings of a hostile climate is equally erroneous. The panel acknowledged that evidence in the record established the existence of racial incidents on the campus, but concluded that the hostile climate did "not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." 38 F.3d at 154 (J.A. 11a). Again, however, this Court has recognized that a racially hostile learning climate is often a consequence of past segregation and that it must be remedied in order for students of all races to be willing to attend previously single-race schools. See *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (mere admission is not enough to meet the mandates of the Fourteenth Amendment; a graduate student is still denied Equal Protection if the student is placed in a hostile environment which affects his "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession"); *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950) ("[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts"). Lower courts likewise have recognized that the effects of a hostile environment necessarily perpetuate the dual system and must be remedied. *Knight* v. *Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994); *Evans* v. *Buchanan*, 582 F.2d 750, 772 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980) (adopting human relations program to prevent racial myths and stereotyping). The panel's implausible conclusion that the proven campus problems at UMCP have no nexus to the prior segregation and cannot, as a matter of law, be affirmatively remedied, simply ignores this precedent.

Third, the panel's analysis of the State's reliance on the underrepresentation of African-American students at the University and lower graduation and retention rates

for these students further illustrates its wrongful application of *Croson* and *Wygant*. While the panel held that there are material issues of fact that should have precluded summary judgment on these issues, 38 F.3d at 156 (J.A. 18a), it again failed to apply the long-standing principle that where a school system formerly was segregated by law, current racial imbalances are *presumed* to be causally related to the prior *de jure* system, and a party disputing the causal relationship bears a heavy burden of proof. See *supra* at 9-10.

Instead, the panel not only effectively placed the burden of proof on the University, but required elimination of other potential causes, holding that "the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity." *Id.* at 160 (J.A. 24a). *By reversing* the presumption of causation established by this Court's school desegregation decisions, the panel was able to analyze the statistical evidence in a historical vacuum, thereby rendering the State's egregious history of segregation irrelevant and creating issues of fact where none exist. By heightening this burden of proof to extend to isolating and disproving any other potential causal factors, the panel further erred under *Bazemore* v. *Friday*, 478 U.S. 385 (1986).

B. The Panel's Application Of The "Narrow Tailoring" Analysis Also Was Erroneous.

The panel's application of the "narrow tailoring" analysis also reflects its failure to apply the correct legal standard. Because the panel did not correctly identify the appropriate objectives of remedial action—*e.g.*, to dismantle the remaining vestiges of segregation—its analysis of whether the State's remedies are "narrowly tailored" to these objectives is erroneous. By failing to appreciate the complex lingering effects of the prior dual education

system, the panel failed to understand why the Banneker scholarship program is in fact necessary to eradicate those effects.

1. *High-achieving African-American Students.*

Pursuing an erroneous analysis under the wrong standard, the panel concluded that the scholarship program is not "narrowly tailored" to its remedial goals of attracting and graduating more African-American students to the campus and curing the reputation and hostile climate problems because "[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past." *Id.* at 158 (J.A. 20a).

This stunning conclusion ignores Maryland's *de jure* history and the stated purposes of the scholarship program. Under Maryland's dual system, all African-Americans, including high-achieving African-American students, were excluded from the University. Indeed, the African-Americans excluded by the *de jure* system were those high-achieving students who, but for the racial qualification, satisfied the University's admissions criteria. Hence, the Banneker program focuses on enrolling the type of students that directly were excluded by the *de jure* system and is therefore designed to remedy the exclusion of past discrimination.

Furthermore, the ultimate purpose of the scholarship program is not just effectively to enroll high-achieving African-American students, but rather to make the University more attractive and hospitable to *all* African-American students. As the district court recognized, the Banneker program will break down racial stereotypes, establish a strong alumni base, and provide role models for all African-American students. *Podberesky* v. *Kirwan*, 838 F. Supp. 1075, 1094-95 (D. Md. 1993) (J.A. 82a-83a). In this way, the Banneker program contributes to the

elimination of all four of the identified vestiges of discrimination.

The panel's simplistic and erroneous analysis failed to recognize the scholarship program's broader purposes. More generally, the panel failed to appreciate that the legacy of state-sanctioned segregation is complex and that eliminating all of the effects is a difficult task calling for creative, long-term solutions. As the district court recognized, the University carefully considered alternative scholarship programs and adopted the Banneker program only after concluding that the alternatives "would not be nearly as effective in remedying the problems that continue to exist." *Id.* at 1095 (J.A. 83a). Indeed, the current version of the Banneker program was implemented only after the University tried a scholarship program that was open to all minority students, and found that the program was not successful in remedying the injury to African-American students. *Id.* at 1081 n.41 (J.A. 48a). Thus, the Banneker program is a good-faith effort by the State to implement an effective remedy to address the State's continuing constitutional violation. Only under the panel's misguided and contrived analysis could it be characterized otherwise.

2. *Including Non-Residents Of Maryland.*

The panel also concluded that the scholarship program is not "narrowly tailored" because it is open to non-Maryland residents. 38 F.3d at 158-59 (J.A. 20a-21a). Again, this conclusion is misguided and erroneous. Under the dual system, all African-American students, both residents and non-residents of Maryland, were excluded from the University. The four factors the State has identified as remnants of past discrimination that require remedial action apply equally to residents and non-residents. Thus, making scholarships available to non-residents is essential to remedy the injury incurred. Indeed, the scholarship program for African-American students is precisely tar-

geted at the group that formerly was excluded from the University.

Again, the panel's analysis was wrong, with the result that it struck down a program that had significant promise of bringing the State into compliance with the Constitution without significant impact on non-African American students.

* * * *

By ignoring nearly half a century of this Court's jurisprudence, the Fourth Circuit's decision below threatens to terminate the uncompleted and sorely needed efforts of former *de jure* segregated school systems to eradicate the effects of their prior conduct. This Court should grant the petitions and reaffirm the importance and centrality of the States' continuing affirmative obligation to remedy the vestiges of segregation.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

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